No. 15592

United States
COURT OF APPEALS
for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

MADAM CADIO G. SIGALAS, et al., owners and PACIFIC ATLANTIC STEAMSHIP COMPANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF FOR APPELLEES

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE B. WOOD,
JOHN R. BROOKE,
Proctors of Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-57

INDEX

INDEX OF CASES

No. 15592

United States
COURT OF APPEALS
for the Ninth Circuit

GLEN TITUS,

Appellant,

vs.

MADAM CADIO G. SIGALAS, et al., owners and PACIFIC ATLANTIC STEAMSHIP COMPANY, Charterer of the SS Santorini, etc.

Appellees.

BRIEF FOR APPELLEES

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

Appellant Titus was injured aboard the SS SANTORINI on February 5, 1955, while working as a longshoreman in the employ of Independent Stevedoring Company, master contracting stevedores. Instead of accepting compensation from his employer, he brought this third party suit against the vessel and its owners.

At the time of the accident, the vessel was port side to the dock at Coos Bay, Oregon. It was being loaded

with a cargo of lumber by the stevedore company. It had a deck load of lumber about 6 feet high.

The accident happened while the longshoremen were using the vessel's loading gear at the forward end of #2 hatch. As a load of lumber was being hoisted aboard, the preventer wire (¾ inch steel wire rope) and rope guy (3 inch manila rope) which held the starboard, or offshore, boom in position, broke. This caused the boom and draft of cargo to swing, and appellant, while running to avoid being hit, slipped and fell injuring his right ankle.

The preventer wire and rope guy were brand new. They had been installed on the starboard boom late in the afternoon of the day before the accident (R. 158). The rope guy and preventer wire were rigged from the top end of the starboard boom to the vessel's rail. The strain on the rope guy and preventer wire had been equalized, so both were equally holding the boom. The rope guy had been rigged through two blocks, so that four lengths of the rope were holding the boom (R. 121). This increased the breaking strength of the rope guy four times (R. 141). The breaking strength of the preventer wire was 14.4 tons (R. 139). Breaking strength of the rope guy (four lengths) was eighteen tons (R. 141, 145).

The preventer wire was secured at the rail by passing through a pad eye, and then to a cleat. The break occurred at least a foot to a foot and a half above the pad-eye, and at a point beyond any possible weakening effect from the bend at the pad-eye.

A full trial was held before the Honorable Chase A. Clark. Sections of the preventer wire and rope guy were produced in evidence. After written briefs were submitted by the respective parties, the trial court found the preventer wire and rope guy were new and without defect, and of proper size and strength for the work for which they were being used, and seaworthy, and a decree was entered in favor of appellees.

This appeal is an attack upon the trial court's findings of fact.

ARGUMENT

FINDINGS OF THE TRIAL COURT SHOULD NOT BE DISTURBED AS THEY ARE FULLY SUPPORTED BY THE EVIDENCE

Appellant's brief and specifications of error are an attack on the trial court's findings of fact. Since most of the pertinent evidence was heard in open court, it is well settled in admiralty that findings of fact of the trial court will not be disturbed unless clearly erroneous.

McAllister vs. The United States, 348 U.S. 19, 20, 99 L.Ed. 20 (1954).

THE PREVENTER WIRE WAS IN GOOD CONDITION AND SEAWORTHY

Appellant's theory of liability was that the preventer wire was defective and unseaworthy. (See the contentions of libelant in the Pre-trial Order, R. 13.) The trial Judge heard the evidence and saw the witnesses and found against libelant.

The Court's finding of fact is as follows:

"VI

"The preventer wire that parted at the time and place of libelant's injury was brand new and without defect. There was no wear, corrosion, brittleness or other condition which would render the wire unseaworthy. It was of proper size and strength for the work for which it was being used." (R. 42)

This finding of fact is abundantly supported by the evidence. Appellee's proof showed the preventer wire and also the rope guy were free of defects. Both the preventer wire and the rope guy were produced in evidence (Pre-trial Exhibits 3a, b and 3c, d). The evidence established the preventer wire was new (R. 158), without defect (R. 136, 137), with a breaking strength of 14.4 tons (R. 139), which is the breaking strength of preventer wires regularly and customarily used on American Liberty and Victory type vessels (R. 144). The rope guy was shown to be new three inch manila rope (R. 144, 157, 158), without defect (R. 144, 148), which was rigged in the usual and regular manner (R. 93), so its breaking strength was quadrupled (R. 141), It was further shown that rope guys on vessels are ordinarily three inch manila rope (R. 148). Three inch manila rope has a breaking strength of 9,000 lbs. (R. 140, 145), and when quadrupled this amounts to 18 tons.

A section from each side of the break of the preventer wire was given to Harry Czyzewski, a metalurgical engineer with excellent qualifications, who made an examination and analysis of the wire (R. 132-134). He made a microscopic examination, hardness tests, and metalagraphic examination of the internal structure of the metal (R. 135).

He found no corrosion, wear, signs of brittleness, or other defect (R. 136, 137). He found the wire had a breaking strength of 14.4 tons (R. 139), and that the break was a tensile break—that is, the break occurred because a force had been exerted on the wire beyond its breaking strength (R. 137).

Another witness, Captain Herman Larsen, an experienced Master in the American Merchant Marine, and who was also an experienced stevedore company walking boss, familiar with the rigging of vessels' cargo gear, also testified that he had examined the wire and found it to be in perfect condition (R. 146, 147, 150).

Likewise, the vessel's Chief Mate, John Kyriacos, with 25 years experience (R. 154), testified the preventer wire was brand new (R. 158). He inspected it before and after the accident and found it in good condition (R. 159).

The preventer wire's strength of 14.4 tons was the same as that ordinarily and regularly found on American Liberty and Victory type vessels (R. 144).

The foregoing evidence and the actual production of the exhibits in court abundantly support the trial court's finding of fact.

DISCUSSION OF APPELLANT'S ARGUMENT

Appellant's case was based only on testimony of libelant and other longshoremen that the wire broke while the loading operation was being done in the ordinary and usual manner and with a normal size load.

From this evidence, appellant hoped to create an inference that the preventer wire was defective.

It is true that in the absence of any other proof as to the condition of the preventer wire, evidence that it broke while the loading operation was being done in the ordinary and usual way with a normal size load could create an inference that it was defective. But in the present case there was abundant, positive evidence, including production of the actual wire itself, to show that it was not defective. In the face of the abundant, positive evidence that the wire was in good condition, the trial Judge declined to draw the inference that it was defective.

At the best, evidence that the loading was being done in an ordinary and regular way is a generality, and involves a great many variable factors. Some of these are the type of cargo, slings, winches, holds, booms, dock, and especially important, the human element of the winch drivers and hatch tenders. They may put an excessive strain on the gear by the jerking of a load or by continuing to pull with the winches when the load catches under the hatch coaming or against a rail, or by raising a load too high and thus creating a tight line condition with the winches pulling against each other. It is therefore impossible to say accurately that the loading operation, at the instant the wire broke, was being done exactly the same as on other occasions. The trial court saw and heard the witnesses, rejected the inference, and made the positive finding that the wire was in good condition. This is fully supported by the evidence.

Appellant places great reliance upon the decision of this Court in Petterson v. Alaska Steamship, 205 F. (2) 478. In that case, the Court drew the inference that a block which broke was defective because it broke while being put to a proper use in a proper manner. That was a proper inference to be drawn in the Petterson case because, as stated in the opinion, "There was no proof as to the condition of the block prior to its use, other than what may be implied from the accident."

In the present case, to the contrary, there is abundant proof as to the condition of the wire, and all of that proof showed that the wire was new and in good condition and of proper size and strength for its intended use.

The other case appellant cites as being "on all fours with the case at bar" is Mahnich v. Southern Steamship Company, 321 U.S. 96. It is not in point. In the Mahnich case a rope holding a staging broke, causing an accident. After the accident, examination of the rope at the point where it broke showed it was so rotted as to be unable to hold the staging. But here the proof is just opposite. Examination afterward showed the wire and rope to be free of defect and of sufficient strength for the purpose intended.

It is interesting to note why appellant chose to attempt to prove his case indirectly by inference. The record shows that a law clerk in the employ of appellant's proctor was on the vessel shortly after the occurrence (R. 68), that he obtained three strands from the broken preventer wire, two from one side of the break and one

from the other (R. 71, 136). The record further shows that by court order appellant had a right to see and inspect the sections of the preventer wire in the possession of appellees (R. 11). The record further shows that appellant had the strands in his posession examined by an expert and had one of the strands chemically analyzed (R. 175). The chemical analysis destroyed one of those strands and it was not produced at the trial (R. 176). The record further shows that only after pressing appellant's proctor did he reluctantly admit near the end of the trial what had happened to the missing strand (R. 176). Appellant did not call its expert witness to testify nor did he intend to explain why one of the strands was missing.

From this it may be inferred that appellant's own expert, if he had been called as a witness, would have given testimony adverse to appellant. In other words, appellant's own direct evidence would also establish that the wire was in good condition so appellant failed to produce that evidence and attempted to rely on an inference, which the trial Judge rejected.

THE NUMBER AND POSITION OF THE PAD EYES AND CLEATS HAD NOTHING TO DO WITH THE ACCIDENT

Because appellant's brief makes reference to the location and number of pad eyes as a possible basis for holding the vessel unseaworthy, we will briefly cover this contention. This possibility can be quickly and completely put to rest.

The trial Court expressly found

"IX

"The preventer wire that parted had been secured at the ship's rail by being passed through a pad eye and then forward to a cleat. The break in the preventer wire occurred at least a foot to a foot and a half above this pad eye. The break occurred at a point well beyond any possible weakening effect caused by the angle of the preventer wire at the pad eye. The angle at the pad eye did not cause or contribute to the breaking." (R. 43)

This finding is fully supported by the evidence. Chief Officer Kyriacos testified the break was 3 feet above the pad eye (R. 164). The stevedore company's walking boss Hasan testified the break was a foot to a foot and a half above the pad eye (R. 101). The uncontradicted testimony showed that there could be no weakening effect on the preventer wire beyond 6 inches from the bend at the pad eye (R. 141). There is no evidence to the contrary.

DAMAGES

Unless this Court reverses the findings of the trial court on the issue of liability, this part of the appeal is extraneous. For that reason our only comment is that the experienced trial court's finding of damages was made after hearing all the evidence, seeing the injured ankle and evaluating the injury. That finding is not clearly erroneous.

CONCLUSION

This is an appeal attacking the findings of the trial court. Those findings are fully supported by the evidence and are clearly correct. Positive proof showed the preventer wire and rope guy were of proper size and strength and free of defect, hence seaworthy. We therefore respectfully submit the trial court's findings should not be disturbed and its decree should be affirmed.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD
& TATUM,
ERSKINE B. WOOD,
JOHN R. BROOKE,
Proctors for Appellees.